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IN THE

Supreme Court of the United States

October Term, 1996

MASSACHUSETTS SCHOOL OF LAW AT ANDOVER, INC.
Petitioner,

V.

AMERICAN BAR ASSOCIATION, ET. AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Law schools are accredited by the Council of the Section of Legal Education of the American Bar Association. The Council establishes and enforces accrediting rules that fix the salaries, terms and conditions of work of the law professoriate. The Council is controlled by economically self-interested members of the professoriate, and operates in secret, with many of its rules and procedures kept hidden even from the ABA's Board of Governors and House of Delegates.

Over 40 states use the Council's accreditation decisions as the determinant of whether a law school's graduates can take the bar examination. The states, however, do not authorize anticompetitive Council rules, procedures and decisions, do not supervise them, do not know of numerous challenged secret rules and procedures used by the Council to make decisions, and have never been petitioned to approve challenged anticompetitive rules, procedures and decisions.

In these circumstances, the first question presented is:

1. Is a private, economically self-interested accrediting body, which acts secretly, wholly immune from antitrust liability for anticompetitive conduct under the state action immunity and *Noerr-Pennington* doctrines?

If certiorari is granted on the first question presented, the following question should also be reviewed to provide full relief in this case:

2. Where an antitrust plaintiff charges an overall conspiracy, which includes price-fixing and other violations, and charges participation in the overall conspiracy by individuals and organizations, is it permissible for the district court to deny discovery on these questions (and on immunity), to disqualify in-house counsel on whom the plaintiff is financially and professionally dependent, and to then rule against plaintiff on the questions as to which it denied discovery?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the following were parties in the district court and in the court of appeals:

Law School Admission Services, Inc.
Law School Admission Council
The Association of American Law Schools, Inc.
James P. White
Nina Appel
Jose R. Garcia-Pedrosa
Laura N. Gasaway
Frederick M. Hart
Rudolph C. Hasl
Carl C. Monk
R.W. Nahstoll
Henry Ramsey, Jr.
Norman Redlich
John E. Ryan
Gordon D. Schaber
Pauline Schneider
Steven R. Smith
Claude R. Sowle
Robert A. Stein
Rennard Strickland
Roy T. Stuckey
Leigh H. Taylor
Frank K. Walwer
Sharp Whitmore
Peter A. Winograd

PARENT COMPANIES AND AFFILIATES

Petitioner Massachusetts School of Law has no corporate parent, subsidiary or affiliate.

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PETITION FOR A WRIT OF CERTIORARI

Massachusetts School of Law at Andover, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals affirming the district court (Pet. App. 1A)[1] is reported at 107 F.3d 1026 (3d Cir. 1997). The opinion of the district court granting summary judgment (Pet. App. 43A) is reported at 937 F. Supp. 435 (E.D. Pa. 1996). The prior opinions of the district court on price fixing, discovery, jurisdiction, recusal and disqualification of counsel are reported at 846 F.Supp. 374 (E.D.Pa. 1994); 853 F.Supp. 837 (E.D.Pa. 1994); 853 F.Supp. 843 (E.D.Pa. 1994); 855 F.Supp. 108 (E.D.Pa. 1994); 857 F.Supp. 455 (E.D.Pa. 1994); 872 F.Supp. 1346 (E.D.Pa. 1994); 895 F.Supp. 88 (E.D.Pa. 1995); and 914 F.Supp. 1172 (E.D.Pa. 1996).

JURISDICTION

The judgment of the court of appeals (Pet. App. 1A) was entered on February 28, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2 (Pet. App. 67A).

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[1] "Pet. App." refers to the Appendix, *infra*. "App." refers to the record in the Court of Appeals.

STATEMENT

A. Introduction

This is an antitrust case brought by the Massachusetts School of Law ("MSL") under 15 U.S.C. §§15(a) and 16 against the American Bar Association ("ABA") and persons and organizations charged with conspiring with the ABA. MSL charges the Sherman Act was violated by anti-competitive accreditation standards and procedures used by, and anticompetitive accreditation decisions made by, economically self-interested private actors.

MSL is a young school which provides legal education to the less privileged, including members of the working class, racial and ethnic minorities, and persons in midlife who seek to improve their lot. App. 7-11, 2085-97, 4043-98. MSL focuses on professional skills to a much greater extent than is traditional in law schools, and uses many more judges and expert practicing lawyers as adjunct professors than is traditional. App. 2085-97. To remain affordable to its less privileged student body, MSL charges tuitions that are only about half of the tuitions charged at ABA law schools in New England. The quality of MSL's education has often been praised by judges, lawyers and professors. App. 1613, 1671, 2096.

The ABA is a private organization. App. 2102. Its accreditation function is in the hands of the Council of the Section of Legal Education, which uses an Accreditation Committee. App.2876-78, 2925. The Committee and the Council make the initial determinations of accreditation standards, procedures and decisions, subject to ultimate review by the ABA's House of Delegates. App. 2876-78, 2924-25. It is exceptionally rare for the House not to uphold these initial determinations.

The Council and the Committee thus have enormous

accreditation power. Indeed, through the ABA they have a monopoly of law school accreditation, to the point, for example, where every judge and every law clerk who has or will work on this case is a product of a school that is part of the ABA system. The monopoly over accreditation exists because over 40 states have a rule requiring ABA accreditation before a school's graduates are allowed to take bar examinations (App. 2876), and because the ABA has claimed to the public for decades that its accreditation is a *sine qua non* of quality. App. 41, 2105, 3071-72.

B. The Antitrust Suits Brought By MSL And The Department of Justice.

1. MSL was denied accreditation by the Accreditation Committee and the Council. App. 837, 905. It then filed an antitrust suit charging the defendants with an anticompetitive conspiracy to which all law schools, including MSL, had to conform if they desired to obtain or retain accreditation. The conspiracy's purpose was to enhance the salaries, terms and conditions of work of the law professoriate. App. 2875, 2922. The charged conspiracy included fixing the price of professors' salaries, reducing their hours and types of work, demanding paid leaves of absence, requiring more jobs for full time professors by use of an arbitrary student/faculty ratio, requiring elaborate physical facilities, and boycotting unaccredited schools. App. 1. MSL also charged that maximum possible secrecy was part of the conspiracy and that a small group of economically self-interested insiders controlled the accreditation process for the economic benefit of themselves and their colleagues in the professoriate. App. 1.

2. After filing its suit in November 1993, MSL presented relevant information to the Antitrust Division in January 1994. The Division thereupon conducted an 18 month investigation and, in late June 1995, filed a complaint and an accompanying

Consent Decree. *The Government made almost all of the charges previously made by MSL and, having obtained 544,000 pages of documents from the ABA, expressly said it could prove these charges at trial.* App. 2878-83.

The Government declared that the accreditation process had been used for the improper purpose of "protect[ing] the interests of professional law school personnel," with site inspection teams "at times [being] unduly concerned with the salaries, perquisites and working conditions of their colleagues." App. 2876, 2931. In fact, faculty salaries had been "nearly exclusively" the determinant by which the accreditors judged the competence of a faculty.[2] App. 2927.

The DOJ found that accreditation had been "captured," "controlled and dominated" by a "guild" that had a "direct economic interest" in the results of accreditation, and that had used accreditation "to advance their self interest by limiting competition among themselves and from others." App. 2875-76, 2884. The guild captors were a "small, permanent group of accreditation insiders" who had been in their "positions for many years," with the guild's "day to day operations" having been supervised by the same academic for 24 years. *United States of America v. American Bar Association*, D.C.D.C. C.A. No. 95-1211 (CRR), United States' Response to Supplemental Public Comments, p. 5; App. 2878, 2884, 2926.

The guild captors caused the process to remain secret: the Government found they not only "kept [it] from public view,"

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[2] MSL had long known, because of prior experience of its personnel in the academic world, that the Council's salary standard was the one which, above all, the accreditors would insist be adhered to if there was to be *any* chance of accreditation. The school raised its salaries accordingly. App. 828, 2122-25. MSL mistakenly believed, however, that the Council, pursuant to a standard expressly allowing variances, would allow departures from certain other standards if a program was of high quality. Depositions and other evidence subsequently showed, however, that the standard allowing variances is never followed. App. 2121, 2241-51.

but even kept it "from the supervision of the ABA's Board of Governors and House of Delegates." App. 2884. Due to the "capture" of accreditation by those with "a direct economic interest," said the Government, "the process that had produced the current rules was tainted" and "reform of the entire accreditation process was needed." 60 Fed. Reg. 63766, App. 2878, 2884, 2890, 2925.

C. District Court Proceedings Relating to Immunity.

In the district court, the ABA did not claim state action immunity for its anticompetitive actions. Also, as pointed out by the DOJ in an amicus brief in the Third Circuit, in the district court the ABA *did not even claim* that it had petitioned state courts or boards to authorize or supervise any anticompetitive accreditation rule, procedure or decision challenged by either MSL or the DOJ. *Brief For The United States As Amicus Curiae* in the Third Circuit, pp. 8, 13.

MSL, on the other hand, presented uncontroverted affidavits from a former state supreme court justice and a former state bar examiner detailing a widely known fact (App. 3530, 3533): state supreme courts and boards of bar examiners *did not even know* of challenged anticompetitive ABA rules and procedures, let alone authorize or supervise them or the anticompetitive decisions based on them.

MSL also asked for discovery of evidence from the ABA's files relating to questions concerning authorization of anticompetitive rules and procedures by state bodies, supervision of such rules and procedures by state bodies, and petitioning of state bodies to approve such rules and procedures and decisions based on them. The discovery MSL requested was not granted. It was denied although MSL charged that the Council had used numerous anticompetitive rules and procedures which were kept secret from courts

rather than being authorized or approved by them,[3] and that

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[3] Among the secret rules were the following (App. 149, 183, 2154-2205, 2206-2221, 2227-31, 2241-51, 2879-84, 2926-30, 3033, 4704-06): A school's salaries would automatically be deemed inadequate if not in the top half among ten competing schools. Leaves of absence had to be *paid* leaves. Student/faculty ratios had to be far lower than the 30 to 1 stated in writing to be presumptively permissible. The accreditors used a student/librarian ratio. A parent university was not allowed to "take" more than 20 percent of a law school's tuition to support other branches of the university or for overhead. Law schools, unlike medical schools, could not grant a student credit for working on cases from which a professor received fees. Physical facilities would be called inadequate unless new or newly refurbished and costing tens of millions of dollars. Although full time students supposedly were barred from working more than 20 hours per week for compensation, they could work as much as they wanted on what the Council chose to call pro bono work. And although the Council's standards contain a provision for waivers, waivers in fact were never granted.

Among the charged, secret anticompetitive procedures used by the Council (App. 36-40, 114-18, 149, 203, 311, 357, 837, 905, 911, 2117-22, 2227, 2662-63, 2876-86, 2925-32, 3015, 3021, 3030, 3033, 3348, 5483-84, 5491, 5501-14, 5599, 5603, 5800-07) were that site inspection teams were "stacked" with Council activists to insure denial of accreditation to schools the Council disfavored, site teams were dominated by economically self-interested professors, the section of *ABA* site reports dealing with faculty was *always* written by a representative not of the ABA, but of the Association of American Law Schools, which was admitted on deposition by its leaders to be a defacto trade association for professors rather than a true organization of schools, members of site teams and of the Accreditation Committee had conflicts of interest, the Council would withhold needed comparative information from schools it disfavored and procedural obstacles were placed in the path of such schools, site teams would write slanted and sometimes outright false reports, accreditation rules were applied inconsistently to punish schools the accreditors disfavored while rewarding those it favored, schools the accreditors favored were allowed to participate in the selection of the chairmen and members of their site teams, and schools which received very bad inspection reports would nonetheless be accredited if and as soon as they hired as dean, at a large salary, one of the "small, permanent group of accreditation insiders" or the spouse of such a person.

the ABA never petitioned the courts to approve its rules, procedures or decisions. The DOJ, of course, specifically found that the Council kept accreditation matters secret even from the ABA's Board of Governors and House of Delegates.

D. District Court Proceedings Relating To Matters Other Than Immunity.

To succeed on the merits, MSL had to obtain discovery of evidence from the ABA's files showing an overall conspiracy, including price fixing, to which every law school including MSL had to conform in order to obtain accreditation.

MSL's requests for this discovery were repeatedly denied by the district court, whose view was that the ABA is widely thought to be "quite good at setting standards" (Pet. App. 64A), and MSL was thus trying to use discovery to "bluff, bluster, bludgeon and bully" its way to the "rewards [of] the undeserving." [4] *Massachusetts School of Law at Andover, Inc., v. American Bar Association, et. al.*, 872 F.Supp. 1346, 1371 (E.D.Pa. 1994).

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[4] The relevant committee of the Department of Education, and the deans of more than 100 Council-accredited schools, do not agree with the District Court's unsupported view, as shown by a publicly available transcript that was lodged with the Third Circuit. The National Advisory Committee of DOE is an expert body that deals with approximately 90 accrediting agencies. The American Law Deans Association ("ALDA") began as 14 deans of mainly prestigious schools and has grown to over 100 deans. After studying the Council's accreditation rules, including rules challenged by MSL, NAC members have called Council standards, among other things, arbitrary, lacking in any relation to educational quality,and far more restrictive than in other professional fields. The original 14 deans castigated Council accreditation for being a straitjacket that prevents *all* law schools from using new or different methods (App. 1686), and ALDA subsequently said the Council uses unjustifiable criteria such as its arbitrary student/faculty ratio, and forces all schools to use methods which often are counterproductive to educational quality.

Only a few months after MSL filed suit, *and prior to any discovery of any type*, the district judge ruled the ABA had not fixed salaries. *Massachusetts School of Law at Andover, Inc. v. American Bar Association, et. al.*, 853 F. Supp. 837, 840 (E.D. Pa. 1994). (The Government later said it could prove the ABA *had* fixed salaries. App. 278-79.) The district judge then used this pre-discovery ruling as the basis for denying MSL any discovery on its charge of an overall conspiracy, including price fixing, to which every school, including MSL, had to conform if it were to have any chance of accreditation.[5] App. 828, 2122-25. He instead permitted MSL only limited discovery which ultimately consisted, in relevant part, almost entirely of documents merely relating to MSL itself and in the ABA's file on MSL itself. *See, e.g.*, court orders entered May 17, 1996 and May 23, 1996.

When denying MSL discovery, the district judge denied it discovery of the incriminating documents which the ABA produced to the government, and on which the government based its charges. The district judge also denied MSL discovery on personal jurisdiction (*Massachusetts School of Law at Andover, Inc. v. American Bar Association, et. al.*, 853 F.Supp. 837 (E.D. Pa. 1994), but dismissed the individual defendants for lack of such jurisdiction. *Massachusetts School of Law at Andover, Inc., v. American Bar Association, et. al.*, 846 F.Supp. 374 (E.D.Pa. 1994); *Massachusetts School of Law at Andover, Inc., v. American Bar Association, et. al.*, 853 F.Supp. 843 (E.D.Pa. 1994). He did not grant MSL discovery on participation in the overall conspiracy by non ABA organizational defendants, yet dismissed them from the case for alleged lack of participation. Pet. App. 65A. And

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[5] Under the district court's rulings, MSL could charge and obtain discovery on price fixing and the overall conspiracy *only if it had been denied accreditation because its salaries were low, and not if it had raised its salaries to levels demanded by the conspiracy in order to have even a chance of accreditation.*

after MSL sought his recusal, he cut off even limited discovery he had previously said would be granted. App. 1432, 4436.

The district court also disqualified MSL's experienced, inside antitrust counsel who were serving without fee. *Massachusetts School of Law at Andover, Inc. v. American Bar Association, et. al.*, 872 F.Supp. 1346, 1379 (E.D. Pa. 1994). This forced MSL to use expensive outside counsel who knew nothing about accreditation. Dozens of depositions -- which occurred in the first year of the case -- thus had to be taken or defended by outside counsel who were ignorant of subjects that were covered therein and that were important notwithstanding limitations on the depositions arising because of the court's orders[6] (e.g., MSL was not allowed to ask questions regarding its charges of an overall conspiracy and price fixing, both of which the Government later said it could prove (App. 2878-84)).

Although MSL depleted its funds by multimillion dollar expenditures on outside counsel, it simply could not afford the additional millions of dollars it would have cost to bring outside counsel up to speed quickly enough.

E. The District Court's Grant Of Summary Judgment.

After the foregoing rulings, the district judge granted summary judgment against MSL. Purportedly relying on the *Noerr* case (*Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)), he ruled the private ABA accreditors were immune from liability for the massive financial injuries MSL has suffered. To the extent injury arose because state rules use the Council's accreditation decisions as the determinant of eligibility for bar examinations,

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[6] The ABA, on the other hand, was represented at depositions by experienced antitrust counsel who had worked on ABA accreditation for up to two decades, as the district judge knew.

he held the state rules are a supervening cause of injury which eliminates all liability under *Noerr*. Pet. App. 47A-52A. To the extent independent injury arose because denial of accreditation stigmatized MSL in the marketplace, he held that under *Noerr* such injury was "incidental" to the allegedly "primary" injury caused by state rules, since the ABA assertedly did not attempt "*directly to persuade*" anyone to boycott MSL. Pet. App. 53A-56A. (emphasis in original). Finally, he ruled that the independent stigmatic injury is the result of free speech. Pet. App. 56A-64A, 65A.

F. The Court of Appeals' Decision.

The court of appeals affirmed in every particular. Pet. App. 1.

1. The court ruled that the accreditors were immune on the ground of state action immunity. Pet. App. 21A. It held that because *state* bodies use the accreditation decisions of the private Council as the determinant of eligibility to take the bar, "*the clear articulation and active supervision requirements . . . are inapplicable.*" *Id.* at 21A (emphasis added). MSL's injury from ineligibility to take bar exams, it held, flows solely from action by the states, and not at all from the Council's anticompetitive decisions used by the states as the determinant of eligibility. *Id.* at 19A-24A, 23A n.9. The court so ruled although it subsequently acknowledged that the Council's accreditation process "is entirely private conduct which has not been approved or supervised explicitly by any state." *Id.* at 29A.

2. Independent stigmatic injury arising in the marketplace was held immune under the petitioning doctrine of the *Noerr* case. *Id.* at 24A-28A. The Third Circuit held *Noerr* applicable on the ground that the Council's accreditation activities -- challenged by MSL *because they set the salaries, terms and conditions of work of law professors* -- are not, as in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492

(1988), "commercial practices of economically interested actors." *Id.* at 26A. Instead, said the court, "the ABA engaged in petitioning activity, and the stigma injury which MSL suffered was incidental to that activity." *Id.*

The only alleged actual petitioning of courts the court could point to were (i) unknown, unspecified petitioning actions engaged in earlier in the century (primarily in the 1920s and 1930s), *long before the enactment and enforcement of the 1973 standards challenged by MSL and the Department of Justice*, (ii) the action of the ABA in merely notifying courts of whether it has accredited a school, (iii) a brief defense of the Council's standards by an ABA official interviewed for a 1994 article in the Boston Globe, and (iv) the fact that, *in an internal debate on the floor of the ABA House of Delegates*, a Council activist claimed to fellow delegates that MSL is a miserable institution to which no Delegate should send a child. *Id.* at 26A-28A

The interview and the internal debate in the House of Delegates were said to be "indirect" petitioning of courts. *Id.* at 28A. Because they purportedly were indirect petitioning of courts, they did not give rise to an exception to *Noerr* which the Third Circuit said would exist if the "ABA 'attempted directly to persuade anyone not to deal with' MSL." *Id.* at 27A.

Also, although Council accreditation is run by law school *employees* who benefit from higher salaries -- including deans, professors and librarians -- the Third Circuit stated that at first glance MSL's claim of a conspiracy to raise law schools' costs "makes no economic sense," and arguably MSL must meet the heavier evidentiary burden applying when one asserts an economically irrational conspiracy. *Id.* at 29A, 30A. Then, purportedly applying ordinary standards, the court rejected the evidence showing that, because of the charged conspiracy, MSL had to and did increase its salaries in order to have even a chance of accreditation. App. 828, 2122-25.

3. The Third Circuit upheld the district court's refusal to

allow MSL discovery of documents showing whether, as charged by MSL and the DOJ, there was a conspiracy which included price fixing *and which every law school had to conform to in order to have a chance of obtaining accreditation*. *Id.* at 14A-18A. In this connection, the Third Circuit ruled the district judge was justified in denying MSL discovery of documents produced to the DOJ (*id.* at 16A-17A), because MSL had sued *before* the DOJ, and the district judge had created "the existing discovery framework" denying MSL evidence it needed to prove there was a conspiracy to which it was required to conform to have even a chance of accreditation. *Id.* at 17A.

The Third Circuit also ruled it proper for the district judge to deny MSL discovery of evidence on the fixing of salaries because (i) the ABA is a professional society whose rules courts are slow to condemn as *per se* illegal, and (ii) the ABA's file on MSL had not shown accreditation was denied because MSL's salaries were too low. *Id.* at 14A-16A. The Third Circuit thereby upheld the district court's view (n.5, *supra*) that MSL could obtain discovery essential to proving the charged conspiracy only if it had been denied accreditation due to low salaries, but not if it had been forced to raise its salaries to levels demanded by the conspirators in order to have even a chance of accreditation. The Third Circuit acknowledged, however, that evidence did show that, when accrediting law schools, the Council would cite salaries when they were low (*id.* at 16A); this acknowledgment confirmed MSL's claim that, to have even a chance of accreditation, it had had to conform to the guild salary standard which the DOJ said was "nearly exclusively" the accreditors' determinant of a faculty's quality. App. 2927.

4. The Third Circuit also upheld the district court's other decisions on discovery, jurisdiction, participation in the

conspiracy, disqualification of inside counsel and recusal.[7]

REASONS FOR GRANTING THE PETITION

1. The Third Circuit's Decision Establishes A Sweeping New Antitrust Immunity, Virtually *Per Se* In Character, Which Threatens Competition In Large Areas Of The Economy.

The Third Circuit's decision establishes a sweeping new antitrust immunity for price fixing agreements, boycotts and other anticompetitive actions in a wide range of fields.

There are an enormous number of private organizations throughout the economy which set accreditation or certification standards, or which make economic decisions, that are in some way used and made effective by state and federal bodies.[8] These private groups' standards and decisions

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[7] Thus the court held (Pet. App. 34A-35A) that the evidence was insufficient to demonstrate participation in a conspiracy by two organizations shown to be extensively interested in promoting the welfare of law professors (the AALS and the LSAC), although MSL had been denied discovery relating to their participation. App. 4431-32. The court held that dismissal of individual defendants for lack of jurisdiction was appropriate although MSL had been denied discovery on jurisdiction. Pet. App. 36A-38A The court ruled it proper for the district judge to disqualify the inside counsel on whom MSL was vitally dependent (*id.* at 41A-42A) and for the trial judge not to recuse himself. *Id.* at 38A-41A.

[8] This occurs, for example, with regard to dentistry, architecture, education, medicine, veterinary medicine, engineering, chiropractic, interior design, marriage and family therapy, mental health, nursing, occupational therapy, psychology, social work, librarianship, optometry, funeral service, innumerable mechanical or industrial devices and products, liquor prices, insurance prices, and many other services and products. *See*, e.g., *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988);

often involve prices, product or service requirements, the determination of who, if anyone, will be subjected to refusals to deal, and other crucial competitive matters. *See, e.g.*, the cases cited in note 8, *supra*.

The Council of the Section of Legal Education is one of these private organizations. The essential characteristics of the Council have been well summarized by the DOJ. As the Government said, the Council's accreditation process was captured by an economically self-interested guild which used it to better the economic lot of themselves and their colleagues while shutting off competition both among guild members and from outsiders. App. 2875-76, 2878-79, 2884, 2890, 2931, 2933. The Council operated secretly, was run by a "small, permanent group of accreditation insiders," and "artificially inflated faculty salaries and benefits, and raised the cost of a law school education." App. 2884, *United States of America*

American Society of Mechanical Engineers v. Hydrolevel Corp., 456 U.S. 556 (1982); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Schwegmann Bros. v. Calvert Distillers*, 341 U.S. 384 (1951); *McKeesport Hosp. v. Accreditation Council*, 24 F.3d 519 (3d Cir. 1994); *Sessions Tank Liners, Inc. v. Joor Manufacturers, Inc.*, 17 F.3d 295 (9th Cir. 1994); cert. denied 513 U.S. 813 (1994); *Lawline v. American Bar Ass'n*, 956 F.2d 1378 (7th Cir. 1994), cert. denied 510 U.S. 992 (1993); *Wilk v. American Med. Ass'n.*, 895 F.2d 352 (7th Cir. 1990); *Schachar v. American Academy of Opthamology, Inc.*, 870 F.2d 397 (7th Cir. 1989); *Zavaletta v. American Bar Ass'n*, 721 F.Supp. 96 (E.D. Va. 1989); *Sherman College of Straight Chiropractic v. American Chiropractic Ass'n*, 654 F.Supp. 716 (1986); *See also, e.g.*, the following state regulations: 59 FL ADC 59 Q-2.014; MN ADC 3100.1150; MN ADC 3100.1160; 234 MA ADC 2.01; 16 CA ADC s. 116. 117; 61 FL ADC 61G1-13.003; MN ADC 1800.1000; MN ADC 1800.2100; 9 FL ADC 9B-66.002; 61 FL ADC 61G15-20.001; 59 FL ADC 59-1.008; 605 MA ADC 3.04; 262 MA ADC 2.02; 244 MA ADC 6.04; 8 NY ADC 76.1; 8 NY ADC 77.1; 59 FL ADC 59R-30.009; 105 MA ADC 900.007; 251 MA ADC 3.03; 59 FL ADC 59P-11.008; 8 NY ADC 62.1; 59 FL ADC 59V-4.004; 61 FL ADC 61 G8-25.001; 603 MA ADC 7.01-7.05; 243 MA ADC 5.02-5.04

v. American Bar Association, D.C.D.C. C.A. No. 95-1211 (CRR), United States' Response to Supplemental Public Comments, p. 5; *Brief For The United States As Amicus Curiae* in the Third Circuit, p. 14, n.5. The Council used secret rules and arbitrary and inconsistent procedures. The Council did not petition state courts or boards, by means of any memorandum, brief, or other means of petitioning, *to authorize or approve the anticompetitive rules and procedures challenged by MSL and the DOJ, and did not even claim on summary judgment to have done so*, as the DOJ pointed out. *Id.* at 8.

The Council's anticompetitive decisions were used by states as the determinant of entry to a profession without any governmental authorization or supervision of its decisions or their underlying anticompetitive rules or procedures, as the Third Circuit acknowledged (Pet. App. 21A), and without governments even *knowing* of underlying rules and procedures. App. 3530, 3533. The Council's anticompetitive decisions also had great impact of their own accord in the marketplace since, for lack of an alternative, the public assumed the Council's decisions to be the disinterested views of an objective, independent third party, as often occurs in similar circumstances.[9]

Despite all this, the Third Circuit ruled the Council wholly immune from antitrust liability. Such ruling amounts, for practical purposes, to *virtual per se* immunity. For under the court's decision, state action immunity exists if state bodies use private decisions *whose underpinnings they are totally unaware of*, and *Noerr* immunity exists if private groups so much as notify the state of these decisions, or give a newspaper interview, or make an internal speech. This case, moreover, is the second time since 1991 that the Third Circuit,

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[9] Gerla, *Federal Antitrust Law and the Flow of Consumer Information*, 42 Syracuse L. Rev. 1029 (1991); Havighurst and Brody, *Accrediting and the Sherman Act*, 57 Law and Contemporary Probs. 199 (1995).

contrary to this Court's decisions, found antitrust immunity even though states did not actively supervise private anticompetitive decisions which they used. The other case was the *Ticor* proceeding, in which this Court squarely rejected the Third Circuit's extension of antitrust immunity. *Ticor Title Ins. Co. v. FTC*, 922 F.2d 1122 (3d Cir. 1991), reversed, *FTC v. Ticor Title Ins. Co., supra.*

It is clear that the Third Circuit's opinion--especially because it immunizes an organization with the notable characteristics described above -- is pregnant with potential destruction of competition in large segments of the economy. For, as said, throughout the economy there are private groups which set standards or make decisions used by governmental bodies, and whose standards and decisions control scores of billions of dollars of commerce. *See* also Bork, *The Antitrust Paradox,* at 347, 349. These private groups' standards and decisions often determine critical competitive issues such as prices, product or service requirements, and refusals to deal. The Third Circuit's decision is an open invitation for such private groups to destroy competition with impunity so long as some governmental bodies use their decisions in some way, without any authorization, supervision or even knowledge of their anticompetitive rules and procedures, and without the private bodies petitioning for approval of those rules and procedures.[10]

2. The Third Circuit's Decision Is Contrary To Decisions Of This Court.

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[10] Under the Third Circuit's decision, the Council could secretly require law schools to pay every dean $200,000 in annual compensation, and boycott any school not doing so, yet remain immune from antitrust liability. This example is close to what occurred in fact, and concretely illustrates the type of highly anticompetitive action that a host of private groups would be able to take with impunity under the Third Circuit's ruling.

This Court repeatedly has recognized that adoption of private economic decisions by governmental bodies is rife with potential destruction of competition by private determinations. It has thus said that the Sherman Act is applicable in "hybrid" situations where governmental "mechanisms merely enforce private marketing decisions" and private actors are granted "`a degree of regulatory power.'" *Fisher v. Berkeley*, 475 U.S. 260, 268 (1986). In these "hybrid" situations, government takes some action which renders private commercial decisions effective: government may render them effective, for example, (i) by enacting a private group's standards into law verbatim or with some amendments (as in the *Allied Tube*, *Hydrolevel*, *Lawline* and *Sessions* cases, *supra*), (ii) by using price levels or other transaction terms set by the private actors (as in the *Ticor*, *Midcal*, and *Schwegmann* cases, *supra*), or (iii) by using the private actors' decisions to determine entry into a business or profession (as in this case and the *McKeesport* case, *supra*).

The problem of government making private anticompetitive action effective arose in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), in which a regulatory agency approved and made effective a private anticompetitive tariff requiring consumers to obtain bulbs from Detroit Edison. The Court ruled Detroit Edison could be liable because "the option to have, or not to have, such a program is primarily the respondent's, not the commission's." 428 U.S. at 594. The Court found "there is nothing unfair" in concluding that Detroit Edison's "participation in the decision [to have the anticompetitive program] is sufficiently significant to require that its conduct...conform to federal law." *Ibid.*

Additionally, the *Noerr* doctrine was held not to provide immunity even though Detroit Edison had expressly petitioned the agency by requesting approval of its tariff: "nothing in the *Noerr* opinion implies that the mere fact that a state regulatory agency may approve a proposal included in a tariff, and therefore require that the proposal be implemented...is a

sufficient reason for conferring antitrust immunity...." *Id.* at 601.

Fleshing out *Cantor's* doctrine that a private party can be liable where it has "sufficiently significant" participation in a decision made effective by state law, this Court, in a series of cases, established that for the private party to be immunized by the implementing state action, the state must clearly and affirmatively authorize the anticompetitive action and must actively supervise the anticompetitive conduct. *Ticor*, *supra*; *Patrick v. Burget*, 486 U.S. 94 (1988); *Midcal*, *supra*. *These are the precise requirements which the Third Circuit held to be completely irrelevant in this case*, and which concededly are absent here. These requirements are intended to insure that "anticompetitive acts were *truly* the product of *state regulation*" and that the state "played a substantial role *in determining the specifics*," rather than the acts being in reality "simply [an] agreement among private parties" and simply "promot[ing] the party's individual interests." *Patrick*, 486, U.S. at 100, 101; *Ticor*, 504 U.S. at 634-35 (emphasis added). "*Much as in causation inquiries*," the Court has said, "the analysis [of active supervision] *asks whether the state has played a substantial role in determining the specifics of the [anticompetitive] economic policy.*" *Ticor*, 423. The states played *no* such role here.

By establishing requirements which insure that private rules vitiating competition are the product of and truly "further state regulatory policies," *Patrick*, 100-101, rather than merely "casting...a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement," *Midcal*, *supra*, 445 U.S. at 243, this Court consistently has sought to ensure that states not do what was said to be impermissible in *Parker v. Brown*, 317 U.S. 341 (1953). A state, said *Parker*, can "not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful...." 317 U.S. at 351.

Here the result forbidden by *Parker* is exactly what the

Third Circuit approved. For it is tantamount to allowing mere authorization of violations, or mere declaration of their legality, to grant immunity because the states use the Council's private anticompetitive decisions, when the states neither authorize nor supervise the Council's anticompetitive standards, procedures and decisions, as the Third Circuit acknowledged to be the case here, do not play any role in determining the specifics of the Council's policies, do not even know of them, and surely do not know of rules and procedures that were kept secret even from the ABA's Board of Governors and House of Delegates.

Further implementing its immunity jurisprudence where states make private anticompetitive decisions effective, this Court has rejected *Noerr* immunity (as in *Cantor*) even where a private body's standards were widely adopted into law by being incorporated verbatim or with slight amendments into statutes and ordinances. Important in this connection, as it also was in the *Hydrolevel* case, *supra*, was that economically self-interested actors made the private party's decisions and that improper procedures such as stacking of committees were employed.

In *Allied Tube*, *supra*, which involved immunity for independent marketplace injury in a situation where there was "predictable adoption of [the private body's] Code into law by a large number of state and local governments" (486 U.S. at 502), this Court squarely rejected *Noerr* immunity. It noted that the standards set by private groups "have a serious potential for anticompetitive harm" because, as in the present case, they "deprive some consumers of a desired product, eliminate quality competition, exclude rival products, or facilitate oligopolistic pricing." *Id.* at 500, 500 n.5. The Court was especially concerned that the private group in *Allied Tube*, as is true in its entirety here, was "composed, at least in part, of persons with economic incentives to restrain trade." *Id.* at 501. It said that "the hope of procompetitive benefits [from standards] *depends upon the existence of*

safeguards [wholly lacking here] sufficient to prevent the standard-setting process from being biased by members with independent interests in restraining competition." *Id.* at p. 509.

The Court relatedly stated that a process *which is secret and partisan (as here)*, rather than open and competitive, *and which involves market power (as here)*, will not qualify for immunity:

> *Unlike the publicity campaign in Noerr, the activity at issue here did not take place in the open political arena, where partisanship is the hallmark of decisionmaking, but within the confines of a private standard-setting process.* The validity of conduct within that process has long been defined and *circumscribed by the antitrust laws without regard to whether the private standards are likely to be adopted into law. See supra,* at 500. Indeed, because private standard-setting by associations comprising firms with horizontal and vertical business relations *is permitted at all under the antitrust laws only on the understanding that it will be conducted in a nonpartisan manner, offering procompetitive benefits . . . the standards of conduct in this context are, at least in some respects, more rigorous than the standards of conduct prevailing in the partisan political arena* or in the adversarial process of adjudication . . . . Nor can the setting of the Association's Code be characterized as merely an exercise of the power of persuasion, *for it in part involves the exercise of market power*. . . .Although one could reason backwards from the legislative impact of the Code to the conclusion that the conduct at issue here is 'political,' we think that, *given the context and nature of the conduct, it can more aptly be characterized as commercial activity with a political impact.* Just as the antitrust laws should not regulate political activities "simply because those activities have a commercial impact," *id.*, at 141, *so the antitrust laws*

> *should not necessarily immunize what are in essence commercial activities simply because they have a political impact.* 486 U.S. at 506-507 (emphasis added).

Thus, said the Court, given that "petitioner was at least partially motivated by the desire to lessen competition" (as here), and "stood to reap substantial economic benefits from making it difficult for respondent to compete" (as here),

> "the context and nature of petitioner's efforts to influence the Code persuade us that the validity of those efforts *must, despite their political impact, be evaluated under the standards of conduct set forth by the antitrust laws that govern the private standard-setting process.*" *Id.* at 509 (emphasis added).

Here too the context and nature of the defendant's conduct -- designed to fix salaries, terms and conditions of work -- is such that it should be "evaluated under the standards of conduct set forth by the antitrust laws."

Nor did the *Allied Tube* Court accept the argument, approved by the Third Circuit, that conduct occurring *within* the standards setting body should be immune under *Noerr*, as an *indirect* effort to petition governments, because governments routinely adopted the private body's codes into law and efforts within the body were therefore "the most effective means of influencing legislation." *Id.* at 502. (This argument had previously been rejected by the Second Circuit in *Allied Tube*, in a decision squarely conflicting with the Third Circuit's view here and affirmed by this Court. *Indian Head, Inc. v. Allied Tube & Conduit Corp.*, 817 F.2d 938, 945-46 (2d Cir. 1987), aff'd, *Allied Tube*, *supra*. Other courts of appeal are likewise in conflict with the Third Circuit on this point. *Litton Systems, Inc. v. AT&T*, 700 F.2d 785, 807, 807-808 n.32 (2d Cir. 1983); *Virginia Academy of*

Clinical Psy. v. Blue Shield of Va., 624 F.2d 476 (4th Cir. 1980).)

In *Allied Tube*, the Court rejected the "indirect petitioning" argument because it would free private parties to enter all manner of anticompetitive agreements (as here) on the ground that they were intended to influence governmental action (as occurred here):

> We cannot agree with petitioner's absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action. If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports. . . . Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms. . . . Firms could claim immunity for boycotts or horizontal output restrictions on the ground that they are intended to dramatize the plight of their industry and spur legislative action.[11] 486 U.S. at 503.

This Court also rejected the argument, approved by the Third Circuit, that conduct within a private process should be immunized because it is "incidental" to efforts to influence government or because the defendant did not attempt "directly to persuade" consumers or others to boycott the plaintiffs. 486 U.S. at 505. The context and nature of an association's processes were distinguished from *Noerr* because, "*Unlike the*

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[11] This language subsequently was quoted with approval in *FTC v. Superior Court Trial Lawyers Ass'n.*, 493 U.S. 411, 425 (1990).

publicity campaign in Noerr, the activity at issue here did not take place in the open political arena, but within the confines of a private standard-setting process," as occurred in this case. *Allied Tube*, *supra*, at 506.

Finally, *Allied Tube* made clear that the comment in *Noerr* regarding the absence of an effort "'directly to persuade anyone'" to boycott the plaintiff relates to a situation where "'*all the evidence in the record...deals with the railroads' [massive] efforts to influence the passage and enforcement of laws. Circulars, speeches, newspaper articles, editorials, magazine articles, memoranda and all other documents* discuss in one way or another the railroads' charges'" against the truckers. 486 U.S. at 505 (emphasis added). It was railroads' "classic 'attempt . . . to influence legislation *by a campaign of publicity*,'" said the Court, which caused the "'incidental'" protected effect of direct injury. 486 U.S. at 505 (emphasis added). For there was a massive "*political* figh[t]" in which groups inevitably "'will get hurt by the arguments that are made.'" 486 U.S. at 505 (emphasis added). Here, of course, there was no political battle in a public arena, but rather the use of a private and secret process.

Given the "context and nature" of the "incidental" injury in *Noerr*, other Circuits, in conflict with the Third Circuit, have found liability where a standards setting body did *not* attempt "directly to persuade" anyone not to deal with particular plaintiffs, but simply enacted rules, allegedly necessary for quality, that resulted in individual plaintiffs being harmed. *Wilk v. American Med. Ass'n.*, 895 F.2d 352 (7th Cir. 1990). That is precisely what occurred here.

3. The Lower Courts Need Further Guidance On The Recurring Antitrust Immunity Issues Decided By The Third Circuit.

As said, the Third Circuit's decision immunizing even an organization with the Council's characteristics is pregnant

with possibilities of vitiating competition in large areas of the economy. In this regard, Judge Bork has warned of the danger from "[T]he modern profusion of governmental authorities [which] offers almost limitless possibilities for abuse," coupled with "the claim by predators that they are merely exercising their First Amendment rights to petition and to influence government." Bork, *The Antitrust Paradox*, 347, 349. Professor Elhauge, in the Harvard Law Review, has said that there is "no overarching theory to guide [courts'] resolution of the inevitable doctrinal ambiguities" of the state action immunity doctrine, and that *the judicial focus should be placed on the financial interests of private actors*. Elhauge, *The Scope Of Antitrust Process*, 104 Harv. L. Rev. 668, 675, 685, 687, 689, 693, 696, 703, 703-04 (1991). Where financially self-interested private actors set the rules for their rivals, there is no occasion for immunity.

Here the Third Circuit's opinion contains no discussion, and the other lower court cases from which it claimed support[12] contain relatively little discussion, of underlying principles enunciated by this Court. There was no consideration by the Third Circuit, for example: (i) of the need to determine, "[m]uch as in causation inquiries," whether it is the state or a private group which is fundamentally or "substantially" responsible for anticompetitive acts, (ii) of whether a private group was comprised of economically self-interested actors, (iii) of whether the private group operates secretly or in the open, or (iv) of whether the private group uses procedures which are fair and conduce to unbiased decisionmaking. Given that such fundamental considerations are frequently absent from lower court opinions -- despite this Court's reliance on them -- a decision is needed from this Court to reaffirm that they must be the basis of principled decisionmaking in this area.

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[12]They include *Lawline*, *supra*; *Sessions*, *supra*; *Sherman*, *supra*; and *Zavaletta*, *supra*.

The need for careful evaluation of these factors is particularly evident with regard to the legal profession. As shown by the Third Circuit's reliance on *Hoover v. Ronwin*, 466 U.S. 558 (1984), and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), a view has grown up that lesser standards are applicable to the legal profession than to other fields, and that lesser standards are applicable where state courts are involved instead of other state bodies.

Yet, in *Hoover*, which involved a challenge to the grading and formulation of a bar examination, this Court took pains to emphasize that (i) the state supreme court *itself* established the responsible committee, and its members therefore were state officers, (ii) the state court *itself* specified the subjects to be tested and the qualifications required of bar applicants, (iii) the state court *itself* had known of and "*itself* approved the particular grading formula," and (iv) the state court *itself* gave individualized review to disappointed applicants. 466 U.S. at 572, 576, 577 (emphasis added). *There was no such state knowledge and supervision here.*

Bates involved a challenge to a ban on attorney advertising. As this Court emphasized in *Hoover* and *Midcal*, the state supreme court in *Bates* specifically "had incorporated the ABA's advertising prohibitions into the local Supreme Court Rules." *Hoover*, 466 U.S. at 571. It thus knew of them (unlike the present case). The challenged advertising rules also "reflect[ed] a clear articulation of the State's policy" against lawyer advertising "*and were subject to pointed re-examination by the policy maker -- the Arizona Supreme Court*" (again unlike the challenged rules here). *Midcal*, 445 U.S. at 105 (emphasis added).

Thus, *Hoover* and *Bates* were at pains to insure that it was the state, rather than a private group, which was responsible for challenged anticompetitive rules. This Court should reaffirm that principle here, and should make clear that the legal profession is not the beneficiary of specially lenient rules that provide it with immunity denied others.

4. The Third Circuit's Decision Threatens Not Only Private Enforcement Of The Antitrust Laws, But Government Enforcement As Well.

As shown, the Third Circuit's decision immunized the defendants against private enforcement action. But the decision also appears to immunize private actors against state or federal antitrust enforcement, thereby increasing the potential for damage to competition throughout the economy and causing questions to be raised as to whether the Government had a sustainable case against the ABA.

The Government takes the position that, under *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 at 225-26 (1940), it can bring a case challenging private agreements regardless of whether states give effectiveness to those agreements. But the Third Circuit has ruled that an association's internal private processes such as internal debates are indirect petitioning of government. It is those internal processes by which anticompetitive agreements are made and enforced. If internal processes are constitutionally protected indirect petitioning of government, then the DOJ and states will be as unable as private parties to challenge anticompetitive conduct arising and enforced in those processes. For governmental agencies can no more override constitutionally protected processes than private parties can.

5. Private Antitrust Enforcement Is Threatened By The Third Circuit's Affirmance Of Procedural and Substantive Rulings Under Which It Is Virtually Impossible For A Private Plaintiff To Succeed.

The Court has stressed that private antitrust plaintiffs fulfill the important role of private attorneys general enforcing the antitrust laws, *Atlantic Richfield v. U.S.A. Petroleum*, 495

U.S. 328, 345 (1990); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985); *Hawaii v. Standard Oil*, 405 U.S. 251, 262 (1972), and has said private actions are "a vital means for enforcing the antitrust policy of the United States." *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 136 (1968). It is common knowledge, moreover, that potential defendants often fear and are deterred by the prospect of civil liability much more than by government actions, which often end in consent judgments.

So important is private enforcement to maintaining competition under the antitrust laws that even in the legislative history of the Tunney Act -- which deals with governmental consent decrees and therefore is not the first place one would expect to find concern for *private* enforcement -- Congress did express deep concern over the inability of private parties to sustain a case in view of "the deep pockets of many corporate defendants," the "neutralization" by consent decree of "the only plaintiff with resources adequate to the task of protracted litigation" (the Government), and the "profound impact upon the ability of private plaintiffs to recover" when left "to their own resources." 119 Cong. Rec. 3451, 3452 (1973).

The course of proceedings in the trial court here was a paradigm of the reasons for concern that private plaintiffs will be unable to effectively play the role of private attorney general, which is crucial to upholding competition in the economy under the Sherman Act.

As noted above, the district court ruled at the inception of the case, *before any discovery*, that there was no evidence of price fixing, and then used that ruling to deny discovery of the evidence needed to show there was an overall conspiracy, including price fixing, which MSL had to conform to if it were to have a chance of receiving accreditation. The district court concomitantly refused to allow discovery of incriminating documents produced to the Government; this refusal was

contrary to extensive federal law.[13] The district court refused to allow essential discovery on questions relating to immunity, the ground on which MSL lost the case. It dismissed individual defendants on jurisdictional grounds, and organizational defendants for alleged lack of participation in the conspiracy, without allowing essential discovery on the questions. After MSL sought its recusal, it cut off even limited discovery it previously had said would be taken. It crippled MSL's efforts by disqualifying highly experienced inside antitrust counsel who were serving without fee, and forced MSL to use expensive outside counsel whom MSL could not afford to educate quickly enough -- dozens of important depositions thus had to be taken and defended by lawyers who knew little about accreditation (while the ABA used lawyers having up to 20 years experience with accreditation).

Such rulings, now upheld by the Third Circuit, undermine the ability of private plaintiffs to enforce the antitrust laws: under such rulings, it is difficult to see how any antitrust plaintiff could succeed, regardless of how meritorious its case is. The now existing precedents for such rulings in the courts

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[13] *In re NASDAQ Market-Makers Antitrust Litig.*, 929 F.Supp. 723, 725-726 (S.D.N.Y., 1996); *Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc.*, 87 F.R.D. 53 (E.D. Pa. 1980); *In re Domestic Air Transp. Antitrust Litig.*, ("Domestic Air II"), 142 F.R.D. 354 (N.D. Ga. 1992); *In re Domestic Air Transp. Antitrust Litig.* ("Domestic Air I"), 141 F.R.D. 556 (N.D. Ga. 1992). The practice of allowing private parties to discover documents previously provided to the government has also been followed in numerous cases in which there are no reported opinions. *See In re Residential Doors Antitrust Litig.*, 900 F.Supp. 749, 756 (E.D. Pa. 1995); *In re Electric Weld Steel Tubing Antitrust Litig.*, C.A. No. 79-4628 (E.D. Pa. Feb.28, 1980); *In re Independent Gasoline Antitrust Litig.*, MDL 267 (D. Md. July 19, 1977); *In re Folding Carton Antitrust Litig.*, MDL 250 (N.D. Ill. July 2, 1976); *In re Small Bags Antitrust Litig.*, MDL 360 (E.D. Pa. 1979); *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 269 F.Supp. 540 (E.D. Pa. 1967).

below violate Congress' desire, and the need, for effective private enforcement of the antitrust laws, and call for an exercise of this Court's power to oversee the fairness of proceedings in the lower courts. *Perma Life*, *supra*, at 136 ("Because these rulings by the Court of Appeals seemed to threaten the effectiveness of the private action as a vital means of enforcing the antitrust policy of the United States, we granted certiorari.")

CONCLUSION

Petitioner is a small, young law school founded to give men and women of limited means an opportunity to participate in the legal profession. It has suffered extensive injury from the conduct of a powerful private group of economically self-interested actors who stifle innovative, lower-price competition. They do this by using anticompetitive accreditation rules to protect a system that, in Judge Posner's phrase, is "artificially sustained, indeed bloated." Posner, *Overcoming Law*, 100 (1995). No state has considered, much less approved, their challenged anticompetitive conduct, much of which is secret. Nor has the public had any voice in the matter.

For the sake of present and future students and of the public they will serve, and for reasons set forth in this Petition, including the sweeping, widely applicable new antitrust immunity created by the Third Circuit's decision, this Court should grant certiorari and reverse the Third Circuit's elimination of Sherman Act protection in the important field of legal education.

Respectfully submitted,

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